JOCELINE TAN POH CHOO & ORS

v.

V MUTHUSAMY

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ARIFIN ZAKARIA JCA
RAHMAH HUSSAIN JCA
[CIVIL APPEAL NO: P-02-854-2000]
1 AUGUST 2003

TORT: *Defamation - Publication of alleged libellous article in newspaper - Appeal against liability and quantum - Whether article defamatory - Whether test satisfied - Whether defence under s. 11(1) Defamation Act 1957 available - Whether award of general damages excessive - Whether want of apology justified award for aggravated damages*

The trial judge found in favour of the respondent, a lawyer, in his claim for defamation against the appellants and awarded the respondent RM300,000 as general damages and RM50,000 as aggravated damages. The claim arose out of a newspaper article ('impugned report') published by the appellants relating to a civil suit held in open court involving the respondent and another who were alleged to have cheated an illiterate man in a land deal. The impugned report, amongst others, carried a caption that read "Lawyer and trader conspired to cheat me, claims driver" and a photograph of the respondent.

The appellants, in this instance, appealed against liability and quantum of damages whilst the respondent cross-appealed on the quantum. The issues, *inter alia*, were: (1) whether the complete defence under s. 11(1) of the Defamation Act 1957 ('the Act') was available to the appellants; (2) whether the award of RM300,000 as general damages was excessive; (3) whether the award of RM50,000 as aggravated damages was justified on the basis that the appellants failed to tender an apology for the publication; and (4) whether the interest on the judgment sum should run from the date of judgment or from the date of publication of the impugned report.

Held:
Per Arifin Zakaria JCA

[1] The respondent was a lawyer by profession and a politician. At the material time, he was not only practising as a lawyer but he was also a state assemblyman for the constituency of Prai, Penang. He was also a member of the Penang Port Commission and a notary public. Any reasonable person reading the relevant report would have formed an opinion that the respondent was a cheat and a dishonest person and as such he was not fit to practise law and to hold public office. The impugned report alleging that the respondent had conspired to cheat an illiterate man in a land deal was clearly defamatory of the respondent. (p 712 d-e)

[2] The appellants could not rely on the complete defence of s. 11(1) of the Act. The test applicable was whether the impugned report was a fair, accurate and contemporaneous report of the proceedings that had taken place in open court on 11 Sept 1991. Although the report was contemporaneous since it was published on 12 Sept 1991, it was primarily based on the amended statement of claim filed in court rather than on what had taken place in open court. Therefore, the finding of the trial judge on liability was affirmed. (pp 713 c-f, 715 h & 716 a-d)

[3] The evidence showed that the trial judge was clearly justified in coming to his finding that the respondent failed to adduce sufficient evidence to support his claim of RM1 million as general damages. Further, the trial judge was right in finding that there was no credible evidence to support the respondent's claim that he was not re-nominated as a candidate for the next general election because of the impugned report. (p 718 f-g)

[4] The impugned report merely contained allegations made by the plaintiff in the civil suit against the respondent. Also, the current trend in the award of damages for libel cases in the country suggested that the award by the trial judge was clearly excessive. (p 719 b-c)

[5] Want of apology alone could not aggravate the respondent's injury. As contended by the appellants, since they relied wholly on the statutory defence of absolute privilege, an apology or retraction would not be appropriate. Further, there was no evidence before the court to show that

their conduct was motivated by malice. Therefore, the award of aggravated damages granted by the trial judge was unwarranted and should be set aside. (p 720 e-f)

[Appeal on liability dismissed; appeal on quantum allowed (general damages reduced from RM300,000 to RM100,000 & aggravated damages of RM50,000 set aside); cross-appeal dismissed except on the question of interest to run from the date of the publication of the impugned report and not fron judgment date.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Hakim bicara berpihak kepada responden, seorang peguam, dalam tuntutannya untuk fitnah terhadap perayu-perayu dan mengawadkan responden RM300,000 ganti rugi umum dan RM50,000 ganti rugi teruk. Tuntutan tersebut berbangkit akibat perayu-perayu menerbitkan sebuah laporan suratkhabar ("laporan tersebut'') berkaitan satu guaman sivil yang diadakan di mahkamah terbuka melibatkan responden dan seorang lain. Mereka didakwa menipu seorang yang tidak berpelajaran daripada tanah kepunyaannya. Laporan tersebut, di antara yang lain, bertajuk "Peguam dan peniaga berkomplot untuk menipu saya, dakwa pemandu". Laporan tersebut juga mengandungi gambar responden.

Perayu-perayu kini merayu terhadap liabiliti dan kuantum ganti rugi sementara responden pula merayu balas terhadap kuantum ganti rugi. Isu-isunya, *inter alia*, adalah: (1) sama ada pembelaan sepenuhnya di bawah s. 11(1) Akta Fitnah 1957 ('Akta tersebut') boleh digunakan oleh perayu-perayu; (2) sama ada award RM300,000 ganti rugi umum melampaui batas; (3) sama ada kegagalan perayu-perayu menerbitkan ampun kepada responden mewajarkan award ganti rugi teruk RM50,000; dan (4) sama ada bunga atas jumlah penghakiman berjalan dari tarikh penghakiman atau dari tarikh penerbitan laporan tersebut.

Diputuskan:
Oleh Arifin Zakaria HMR

[1] Responden adalah seorang peguam dan ahli politik. Pada masa berkenaan, beliau bukan sahaja seorang peguam yang sedang mengamalkan profesionnya tetapi beliau juga merupakan seorang ahli dewan undangan negeri bagi daerah Prai, Penang. Beliau juga adalah ahli Suruhanjaya Pelabuhan Pulau Pinang dan notari awam. Sesiapa yang berfikiran waras yang membaca laporan tersebut akan berpendapat bahawa responden adalah seorang penipu dan tidak jujur dan dengan itu tidak berkelayakan

mengamalkan profesionnya dan memegang jawatan awam. Laporan tersebut yang mendakwa responden berkomplot menipu seorang yang tidak berpelajaran daripada tanah kepunyaannya jelas memfitnahkan responden.

[2] Perayu-perayu tidak boleh bergantung atas pembelaan sepenuhnya s. 11(1) Akta tersebut. Ujian yang terpakai adalah sama ada laporan tersebut adil, tepat dan semasa dengan prosiding yang diadakan di mahkamah terbuka pada 11 September 1991. Walaupun laporan tersebut merupakan laporan semasa kerana ia diterbitkan pada 12 September 1991, ia berdasarkan terutamanya atas pernyataan tuntutan pinda yang difailkan di mahkamah dan bukan atas apa yang berlaku di mahkamah terbuka tersebut. Dengan itu, keputusan hakim bicara atas liabiliti disahkan.

[3] Responden gagal untuk mengemukakan keterangan yang cukup untuk menyokong tuntutan RM1 juta ganti rugi awam. Lagipun, tiada keterangan yang munasabah yang menyokong tuntutan responden bahawa beliau tidak dilantik semula sebagai calon pilihanraya umum berikutnya kerana laporan tersebut.

[4] Laporan tersebut hanya mengandungi dakwaan-dakwaan plaintif di dalam guaman sivil terhadap responden. Juga, tren semasa award ganti rugi untuk kes-kes libel dalam negara ini menunjukkan bahawa award hakim bicara bagi ganti rugi awam jelas melampaui batas.

[5] Oleh kerana perayu-perayu tidak menerbitkan ampun tidak bermakna keadaan responden diburukkan lagi. Seperti yang dihujahkan perayu-perayu, oleh kerana mereka bergantung sepenuhnya atas pembelaan statutori perlindungan mutlak, maka tindakan untuk menerbit ampun atau menarik kembali kenyataan fitnah berkenaan tidak sesuai. Lagipun, tiada keterangan di hadapan mahkamah untuk menunjukkan bahawa tindakan perayu-perayu menerbitkan laporan tersebut disebabkan perasaan dengki terhadap responden. Dengan itu, award ganti rugi teruk yang diberikan oleh hakim bicara tidak berasas dan patut diketepikan.

[Rayuan terhadap liabiliti ditolak; rayuan atas kuantum ganti rugi dibenarkan (award ganti rugi awam di turunkan daripada RM300,000 kepada RM100,000 & award ganti rugi teruk RM50,000 diketepikan); rayuan-balas ditolak kecuali berkenaan soalan bunga atas jumlah penghakiman yang diputuskan berjalan dari tarikh penerbitan laporan tersebut dan bukan dari tarikh penghakiman.]

Case(s) referred to:
Carson v. John Fairfax & Sons Ltd [1993] ALR 577 ***(foll)***
Hill v. Chruch of Scientology of Toronto [1995] 2 SCR 1130 ***(refd)***
Jones v. Skelton [1963] 3 All ER ***(refd)***
Karpal Singh Ram Singh v. DP Vijandran [2001] 3 CLJ 871 CA ***(refd)***
Karpal Singh Ram Singh v. DP Vijandran [2003] 2 CLJ 77 FC ***(foll)***
Liew Yew Tiam & Ors v. Cheah Cheng Hoe & Ors [2001] 2 CLJ 385 CA ***(refd)***
Ling Wah Press (M) Sdn Bhd & Ors v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals [2000] 3 CLJ 728 FC ***(refd)***
Mc Carey v. Associated Newspaper [1964] 1 WLR 855 ***(refd)***
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [1995] 2 CLJ 912 CA ***(refd)***
Praed v. Graham [1889] 24 OBD 53 ***(refd)***
Stern v. Piper [1996] 2 All ER 385 ***(refd)***
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 11(1)

Other source(s) referred to:
Gatley on Libel and Slander, 9th edn, paras 13.32, 13.44

For the appellant - JA Yeoh; M/s Shearn Delamore & Co
For the respondent - V Muthusamy (CV Prabhakaran); M/s V Muthusamy & Tan

Reported by Usha Thiagarajah

JUDGMENT

Arifin Zakaria JCA:

The Background Facts

This claim by the respondent arose out of a newspaper report in the New Straits Times of 12 September 1991 under the caption "lawyer and trader conspired to cheat me, claims driver". Accompanying the report is a photograph of the respondent. The complaints by the respondent are against the caption, the first five paragraphs in the first column of the report ("the impunged report") and the photograph accompanying the report. The impugned report reads as follows:

> Penang Wed. – A lawyer allegedly conspired to cheat an illiterate man who had engaged him to facilitate the purchase of a property in Kulim, Kedah, the High Court was told today. Driver G. Paramasivam claimed that the lawyer N. Muthusamy had breached their contract by allowing the land worth 376,900 to be transferred to a businessman nine years ago without his knowledge or permission. He said that when he demanded an explanation from Mr. Muthusamy, the driver claimed he did not know anything and asked him to leave his office.

He has named in his suit businessman Varlivell alias V. Vadiveloo as the first defendant and Mr. Muthusamy as the second defendant. He claimed he was cheated of the property as the result of the conspirary between the two defendants and is seeking an order for the return of his property damages and costs.

It is not in dispute that the word "lawyer" in the said report refers to the respondent.

The respondent brought this action against the 1st appellant as the author of the report, the 2nd appellant as the editor and the 3rd appellant as the proprietor and publisher of the newspaper. The respondent claims compensatory and exemplary damages and an injunction to restrain the appellants from further printing, circulating, distributing or otherwise publishing the said or similar report.

On Liability

In the amended statement of defence filed herein the appellants raised the defence of absolute privilege under s. 11(1) of the Defamation Act 1957. The particulars of facts in the statement of defence reads as follows:

Butir-butir Fakta.

(i) Melalui satu Guaman Sivil di Mahkamah Tinggi Pulau Pinang No. 164 tahun 1984 seorang yang bernama Paramasivam a/l Govindaraji telah mengambil tindakan undang-undang terhadap seorang Defendan bernama Varlivell @ Vadiveloo a/l Varatharajoo dan Plaintiff telah dinamakan sebagai Defendan Kedua; dan

(ii) Dalam guaman sivil tersebut Paramasivam a/l Govindaraji tersebut, plaintif yang dinamakan di dalamnya, telah, di dalam Pernyataan Tuntutan Terpinda beliau bertarikh 24 April 1984 mengatakan, antara lainnya, bahawa Plaintif telah secara fraud dan melalui salah nyata mendorong Paramasivam a/1 Govindaraji tersebut untuk menandatangani surat bertarikh 12hb November 1982 tanpa menjelaskan kandungan di dalamnya dan telah bermuafakat untuk mengambil hakmilik benefisial Paramasivam a/l Govindaraji tersebut terhadap harta dalam perlanggaran kontrak dan bercanggah dengan etiket dan etika professional Plaintif (selepas ini dirujuk sebagai "pengataan tersebut");

(iii) Defendan-defendan menegaskan bahawa pengataan tersebut telah dirujuk beberapa kali oleh Yang Arif Hakim perbicaraan dan juga oleh peguam bagi Paramasivam a/l Govindaraji tersebut sewaktu prosiding yang didengar secara awam tersebut;

(iv) Defendan-defendan menegaskan bahawa perkataan yang terdapat di dalam rencana tersebut selain daripada pengataan tersebut adalah merupakan keterangan Paramasivam a/1 Govindaraji tersebut yang diberikan di dalam prosiding di hadapan Yang Arif hakim perbicaraan dan juga telah direkodkan oleh Yang Arif hakim perbicaraan di dalam nota keterangan yang rasmi.

The appellants further deny that the respondent's photograph was published with malicious intention in order to damage the respondent's reputation both as a lawyer and a politician. The appellants contend that the said photograph was published in the context of the report since the respondent is a well known figure both in the legal circle as well as in political arena.

The learned judge having heard the parties and submissions of counsel came to the finding that the appellants failed to prove that the report was a fair and accurate and a contemporaneous report of the proceedings publicly heard before a court. He then awarded the sum of RM300,000 as general damages and the sum of RM50,000 being aggravated damages plus interest thereon at 8% p.a. from the date of judgment and costs. The appellants now appeal against the findings of the learned judge both as regard liability and quantum. The respondent cross appeals on the quantum.

It should be stated at the outset that the report relates to the proceedings in the Penang High Court in C.S. No. 25-164-84 ("the said action"). In the said action the respondent herein and one Vallivell @ Vadiveloo a/l Varatharajoo were sued by his former client by the name of Paramasivam a/l Govindaraji. The said action concerns the transfer of a piece of of land in Kulim Kedah.

The report relates to the proceedings of 11 September 1991, the first day of the hearing of the said action before his Lordship Mohamed Dzaiddin J (as he then was).

The first pertinent issue for determination is whether the said report is defamatory of the respondent. What is the proper test to be applied in determining the said issue. In *Jones v. Skelton* [1963] 3 All ER L. Morris referring to L. Selborne in *Capital and Countries Bank v. Henty* stated the test in the following terms:

> It is well settled that the question whether words which are complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for decision by the court. If the words are so capable then it is a question for the jury to decide whether the words do in fact convey a defamatory meaning. In deciding whether words are capable of conveying a defamatory meaning the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation. In *Capital and Countries Bank v. Henty* Lord Selborne said:

> The test according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men to whom the publication was made, would be likely to understand it in a libelious sense.

Mohamed Azmi J (as he then was) in *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 at p. 58 put the test in the following words*:*

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

In the present case the respondent is a lawyer by profession and also a politician. At the material time he was not only practising as a lawyer but he was also a state assemblyman for the constituency of Prai, in the State of Penang. He was also a member of the Penang Port Commission and a Notary public. Applying the test propounded in the abovecited cases we are of the view that the allegation as contained in the impugned report alleging that the respondent had conspired to cheat an illiterate man in a land deal is clearly defamatory of the respondent. In our view any reasonable person reading the relevant report would have formed an opinion that the respondent is a cheat and dishonest person and as such he is not fit to practise law and to hold public office. In the light of what we have just said we therefore agree with the finding of the learned judge that the impugned report was defamatory of the respondent. Next we shall consider the defence raised by the appellant.

Defence Under S. 11(1) Of The Defamation Act 1957

In the amended defence the appellants raised the statutory defence of absolute privilege as provided in s. 11(1) of the Defamation Act 1957 which reads as follows:

> s. 11(1) A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and *bona fide* comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of the publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation.

It is settled law that if the impugned report comes within the ambit of s. 11(1) of the Act that will offer a complete defence to a claim for defamation. The rationale for this may be found in the judgment of Thompson J in *Mc Carey v. Associated Newspaper* [1964] 1 WLR 855 at p. 856 where he said:

> In regard to judicial proceedings the law regards it as important that what goes on in a public court should be known and should be fairly and accurately and contemporaneously reported. ... In the case, however, if a newspaper which is making a contemporaneous report of what has happened in judicial proceedings, so long as the newspaper fairly and accurately reports what happens, it is immune from liability.

Therefore, the critical issue here is, whether the impugned report was a fair and accurate and contemporaneous report of the proceedings that had taken place in the open court on 11 September 1991. Firstly, can the report be considered as contemporaneous? *Gatley on Libel and Slander,* 9th edn. para. 13.32 discussed the meaning of "contemporaneously" as used in the Law of Libel Amendment Act 1888. It says as follows:

> Meaning of 'contemporaneously'. There is no English decision as to the meaning of the word 'contemporaneously' in the 1888 Act. It is submitted that the word means 'as nearly at the same time as the proceedings as is reasonably possible, having regard to the opportunities for preparation of the report and the time of going to press or of making the broadcast'. If this submission be correct, a report published in the next edition of a daily paper, or in the issues from day to day, if the proceedings were extended, would be 'comtemporanerous'; so, too, perhaps would be a report in the next issue of a fortnightly paper, even though published 10 or 12 days after the proceedings. But if a daily paper delayed in report for 10 or 12 days, the report could clearly not be said to have been 'published comtemporaneously' with the proceedings.

We would adopt the meaning of "contemporaneously" as stated above. Since the report in the present case was published on 12 September 1991 purportedly of the proceedings of 11 September 1991, therefore, the report would certainly pass the test of contemporaneity as explained above.

The next issue is whether the impugned report could be regarded as a fair and accurate report of proceedings publicly heard before a court. The point in contention here is whether the report should only be confined to what was publicly heard in open court and not to matters contained in documents filed in court, and not read in open court. The learned counsel for the respondent contends that privilege will not attach to the publication in a newspaper of

contents of pleadings, affidavits or other papers filed in civil proceedings and not brought up in open court. The underlying reason for this may be found in para. 13.44 *Gatley on Libel and Slander*, 9th edn. which reads:

> It would be carrying privilege further than we feel prepared to carry it, to say that, by the easy means of entitling and filing a statement of claim in a cause, a sufficient foundation would be laid for scattering any libel broadcast with impunity.

In this regard we would also refer to the statement of Hirst LJ in *Stern v. Piper* [1996] 2 All ER 385 at pp. 394-395 which reads:

> However, I think it is significant that privilege only protects reports of proceedings taking place in open court, and that its foundation is that those proceedings took place in public so that the public in general should have access to fair and accurate reports thereof (see *Webb v. Times Publishing Co. Ltd.* [1960] 2 All ER 789, [1960] 2 QB 535). This is a consideration of public policy, and does not extend to court documents which have not been brought into the public arena.
>
> In the chapter on qualified privilege in the section entitled 'Judicial Proceedings', under the heading 'Publication of contents of documents not brought up in open court', Gatley quotes a statement by Holmes J in *Cowley v. Pulsifer* [1884] 137 Mass 392 at 394:
>
> > It would be carrying privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and filing a statement of claim in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity. (See *Gatley* (8th edn. para 624)
>
> This statement was made in the context of common law privilege, but I think it is nonetheless pertinent, and, that, if reports of affidavits, or other court documents, not produced in open court, were to have the protection of privileges extended to them, it could only be done by statute. I do not for one moment suggest that such an extension would be either practicable or desirable, since it would be very difficult to frame a rule which was just to all parties involved, but in the unlikely event of such a reform being attempted, it is unthinkable that considerations of accuracy and fairness would not require both sides' allegations to be reported, and not, as here, only one side's.
>
> It is indeed the one sidedness of the present publication which to my mind vindicates the justice of applying the repetition rule to the present case, avoiding the unfairness similar to that identified by Lord Denning in the *'Truth'* (NZ) case of a private court document emanating from one side being disseminated on a very wide scale to the public at large.

> On the other hand, I do not think that this decision will have the dire effect on the freedom of the press which Mr. Eady predicts. The media will be free to report the issue of proceedings in both civil and criminal cases, and will have the full protection of privilege, (whether absolute or qualified according to the circumstances) for fair and accurate reports of all proceedings of either kind in open court. This, to my mind, furnishes ample scope for keeping the public properly informed.

In the present case the respondent contends that neither the witness G. Paramasivam nor the learned trial judge or learned counsel in the said action made the defamatory statements as contained in the impugned report. The 1st appellant in her evidence frankly admitted that "the article was based on evidence given in open court as well as the statement of claim." Mr. Karpal Singh, the counsel for the plaintiff in the said action was called by the appellants. In his evidence Mr. Karpal Singh stated, *inter alia*:

> The statement as reported in second and fifth paragraphs in the 1st column of Bundle C page I reflects my client's claim as set out in the ASC (Amended Statement of Claim).
>
> The said statement could have been said by me during the course of opening address perhaps adverting to the issues before my client took the stand.
>
> From my experience some judges record in detail what transpired during the trial and some judges do not.

This brings us to the question whether or not there was an opening speech by Mr. Karpal Singh. The respondent and Encik Yap Chin Guan (SP2) denied that there was an opening speech by Mr. Karpal Singh. The learned trial judge after having considered the evidence before him came to the finding that the learned counsel did not make an opening speech. He gave his reasons for his finding, which are briefly as follows. Firstly because SD1, the 1st appellant herself in the report did not say that there was an opening speech by Mr. Karpal Singh. Secondly SD4, Mr. Karpal Singh, himself was not sure whether he did make such a speech. Thirdly, the note of proceedings of the court did not indicate that Mr. Karpal Singh did make such a speech. Having considered the matter we are of the view that there is no valid reason for us to disturb the above finding of the learned judge.

Based on the above it is clear that the statement as contained in the impugned report could only have been derived from the amended statement of claim filed in the court which was admittedly made available to the 1st appellant by Mr. Karpal Singh. Paragraphs 12 and 13 of the amended statement of claim in the said action indeed contain allegation that the respondent herein conspired with the 2nd defendant in the said action to defraud the plaintiff in the said action.

Based on the above the learned trial judge then came to his finding that the impugned report was primarily based on the amended statement of claim rather than on what had taken place in the open court. This is a finding of facts by the learned judge. We find that the finding of the learned judge is far from being perversed, on the contrary we think it is fully supported by the evidence before him.

The next issue is whether the appellants are entitled, in the circumstances, to rely on the statutory defence of absolute privilege under s. 11(1) of the Act. We have no hesitation to say that our answer is in the negative. For support we would rely on para. 13.44, *Gatley on Libel and Slander* 9th edn. and the observation of Hirst LJ in *Stern v. Piper* cited above. Having said that we would conclude by saying that the publication by the appellants of part of the amended statement of claim which has not been read out in open court is not within the scope of the protection given by s. 11(1) of the Act.

For the above reasons we affirm the finding of the learned trial judge with regard to liability.

The Award Of General And Aggravated Damages

The learned trial judge made the following awards of damages:

(i) the sum of RM300,000 as general damages; and

(ii) the sum of RM50,000 as aggravated damages.

The appellants appeal against the said awards and the respondent cross-appeal on the award of general damages.

Firstly on general damages. The appellants contend that the award is excessive in the light of the recent decisions of this court. The appellants referred us firstly to the case of *Karpal Singh a/l Ram Singh v. DP Vijandran* [2001] 3 CLJ 871. In that case the appellant was sued for defamation arising from a press statement made by the appellant concerning the respondent. The High Court found for the respondent and awarded a sum of RM300,000 as damages taking into consideration the position and standing of the respondent as a politician, a former deputy speaker for Dewan Rakyat, a member of Parliament and a lawyer. The appeal to this court was dismissed with regard to liability but was allowed on quantum. Abdul Hamid Mohamad JCA delivered the judgment of the court. After considering a long line of authorities on the issue of quantum he said:

I may have missed out some cases but I think that the cases that I have referred are sufficient to show the trend. Until the arrival of *Vincent Tan* in 1995, the highest award ever given by the court in this country was RM100,000. *Vincent Tan* sky rocketed the awards. When the award was confirmed by the Court of Appeal, what was an isolated pinnacle in an otherwise undulating plain, the trend is set. When the Federal Court confirmed it, it became a binding precedent in all the courts in this country. But, now the Court of Appeal in *Liew Yew Tiam* has had second thoughts about it. The learned judge of the Court of Appeal who wrote the main judgment in *MGG Pillai* has sought to distinguish *MGG Pillai*'s case. 'It is a decision that has been much misunderstood and the trend should be checked,' he said.

This court is bound by the decisions of the Federal Court. But what is binding is the principle laid down by the Federal Court in assessing damages in libel cases, not the amount. The amount to be awarded in each case depends on the facts and the circumstances of the case. Indeed, how much is too much, how much is too little and how much is reasonable is quite subjective. No scale can be fixed. But it does not mean that, given a set of facts, the appellate court cannot say confidently that an award is too little or too much or reasonable. It is the same as in an appeal against sentence in a criminal case or an appeal against an award of damages in other civil cases.

The principle that this court should apply is clear whether this court is of the view that the trial judge had 'acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of damage suffered'. (See *Ling Wah Press (M) Sdn. Bhd. & Ors. v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* and the cases referred to therein.)

I would not say that the learned judge had acted on wrong principle in this case. However, I am of the view the learned judge has misapprehended the facts and was also influenced by the prevailing trend then.

The second case referred to us is *Liew Yew Tiam & Ors v. Cheah Cheng Hoe & Ors.* [2001] 2 CLJ 385 which is also the decision of this court. In that case Gopal Sri Ram JCA who wrote the leading judgment in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [1995] 2 CLJ 912, indeed warned against using that case as an unsurmountable hurdle of binding precedent in future cases. At p. 395 he wrote:

For, at the end of the day, the Federal Court affirmed the award made in the circumstances of that particular case as a proper exercise of judicial discretion by the Higher Court upon the question of damages. We do not think that it automatically follows as a matter of policy that the plaintiff in any case should be entitled to receive an award in millions of ringgit.

The role of appellate court in the assessment of damages is plain from the authorities cited to us. An appellate court is not entitled to substitute its own judgment merely because it would have arrived at a different figure. It has been stated time and again that unless the verdict is so outrageously exorbitant, or shockingly excessive in relation to the libel, or manifestly unreasonable, unjust or irrational, the appellate courts should proceed with caution before making any variation in assessment of damages in libel case. (See *Ling Wah Press (M) Sdn. Bhd. & Ors. v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* [2000] 3 CLJ 728.)

In addressing the issue of damages the learned judge stated as follows:

> Mengenai gantirugi pada pendapat saya apa yang diberi lebih pada memadai. Saya dapati tiada justifikasi untuk Mahkamah memberi lebih dari itu. Ia berdasarkan prinsip yang dibentang dalam kes *MGG Filial v. Tan Sri Dato' Vincent Tan Chee Yioun* [1995] 2 CLJ 912. Keterangan yang diberi oleh plaintif tidak 'justify' yang beliau mengalami kerugian sehingga RM1 juta. Keterangan plaintif tidak mencukupi bagi menunjukkan dia mengalami kerugian sedemikian seperti kerugian legal practice daripada tahun 1991 hingga 1997 sebanyak RM706,025.87.
>
> Tiada bukti bahawa beliau tidak dilantik untuk jadi calon kerana tersiarnya laporan C1. Adalah biasa bagi ahli politik digugurkan atas sebab-sebab di luar dugaan dan tiada bukti Presiden MIC tidak lantik plaintif bertanding oleh kerana laporan C1. Bagaimana plaintif boleh anggap beliau akan dilantik jadi Ahli Exco jika menang pilihanraya. Itu hanya ramalan plaintif sahaja. Adakah digerenti plaintif boleh menang pilihanraya. Pada hemat saya gantirugi yang diberi agak tinggi bila mengambilkira keterangan yang 'credible'. Saya ambil kira kedudukan plaintif secara keseluruhan.

We have scrutinised the evidence before the court and we came to a firm finding that the learned judge was clearly justified in coming to his finding that the respondent failed to adduce sufficient evidence to support his claim of RM1 million as general damages. We further agree with the learned judge that there is no credible evidence to support the respondent's claim that he was not renominated as a candidate for the next general election because of the impugned report. As the learned judge correctly observed a politician may be dropped as a candidate for a variety of factors and barring clear evidence showing that the respondent was dropped due to the impugned report one can only speculate as to the real reason or reasons that had prompted the respondent being dropped as a candidate for his party. However, in his judgment, particularly the part cited above, the learned judge did say that the amount of award made by him may be on the high side considering all the credible

evidence before him. In this regard we are of the view that the observation of this court in *Karpal Singh a/l Ram Singh v. D.P. Vijandran* [2001] 3 CLJ 871 cited above is highly pertinent.

In this case the claim arose out of an article in a newspaper which is related to an on going civil suit in the High Court at Penang. After carefully reading the impugned report we are of the view that it merely contains allegations made by the plaintiff in the said action against the respondent herein. Such allegations are not uncommon in the court of law. No doubt the appellants are not free from blame. It is more a question of degree. Judging in that light and the current trend in the award of damages for libel cases in this country we are of the view that the award by the learned judge in the present case is grossly excessive. In the circumstances we would reduce the award of general damages from RM300,000 to that of RM100,000.

In regard to aggravated damages the learned judge stated thus:

> Aggravated damages RM50,000 diberi sebagai tambahan kepada compensatory damages oleh kerana defendan-defendan berdegil tidak mengambil apa-apa langkah seperti memohon maaf dan sebagainya (sila lihat *Sandison v. Malayan Times Ltd. & Ors.* [1964] MLJ 372; *Rajagopal v. Rajan* [1972] 1 MLJ 45).

The learned counsel for the appellants contends that the learned judge had fallen into error in making the award of aggravated damages on the basis of the appellants' failure to tender an apology for the publication. He submitted that in the law of libel the absence of apology does not fall within the circumstances which justify an award of exemplary or aggravated damages. The circumstances in which such damages may be awarded he contends are rather circumscribed.

The circumstances in which aggravated or punitive damages may be awarded in addition to the compensatory general damages are clearly set out by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto* [1995] 2 SCR 1130 which was cited with approval by this court in *Liew Yew Tiam & Ors v. Cheah Cheng Hoc & Ors (supra).* In that case Cory J in delivering judgment of the court stated:

> Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libelious statement. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff either by spreading further a field the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff.

If settled law that aggravated damages cover a broad ambit, the court is entitled to look at the conduct of the defendant from the time the libel was published down to the time a verdict is reached by the jury or a decision made by the court. (See *Praed v. Graham* [1889] 24 OBD 53. In this case the complaint by the respondent was that the appellant failed or refused to retract or to make a satisjfactory correction with respect to the impugned report. We are of the view that whether such a failure or refusal would render a defendant liable to aggravated damages would certainly depend on the particular facts and circumstances of a given case. We are supported in this by the decision of the High Court of Australia in *Carson v. John Fairfax & Sons. Ltd.* [1993] ALR 577. The majority view in that case at p. 593 reads:

> ... we have difficulty in understanding how the mere absence of an apology can aggravate damages. Whereas publication of an apology may mitigate damage, thereby reducing the harm suffered by a plaintiff in a defamation case, and so reduce the damages awarded, the failure to publish an apology does not increase the plaintiff's hurt or widen the area of publication. No doubt want of apology may be a relevant factor in establishing that a defendant is motivated by a desire to injure the plaintiff but that does not mean that want of apology itself aggravates the plaintiff's injury.

Similarly in the present case we are of the view that want of apology alone could not be said to have aggravated the plaintiff's injury. We have to consider other relevant facts. The appellant relied wholly on the statutory defence of absolute privilege and in the circumstances the appellants' counsel contends an apology or retraction would not be appropriate. Further, he contends there is no evidence before the court to show that the appellants' conduct was motivated by malice. Having considered the matter we agree with the contention of counsel for the appellants that in the circumstances of this case an award of aggravated damages is wholly unwarranted and we, therefore, set aside the award of aggravated damages.

Conclusion

In the result we dismissed the appellants' appeal on liability but allowed their appeal on quantum. The award of RM300,000 as general damages is hereby set aside and substituted therefore with an award of RM100,000. It is further ordered that the award of aggravated damages of RM50,000 is set aside. It follows therefore that the cross-appeal by the respondent is dismissed except on the question of interest. On the question of interest the learned judge awarded interest of 8% p.a. on the judgment sum from the date of judgment. We are of the view that in the light of Federal Court's ruling in *Karpal Singh a/l Ram Singh v. DP Vijandran* [2003] 2 CLJ 77 the award of interest should run from the date of publication of the impugned reports and it is so ordered.

As for costs, since the appellants only succeeded in part of the appeal we would, therefore, award half costs of this appeal to the appellants to be taxed. We made no order as to costs on the cross-appeal. Deposit to be refunded to the appellants.